No. 14661

United States
COURT OF APPEALS
for the Ninth Circuit

SAM D. RAWSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court for the District of Oregon

NORMAN N. GRIFFITH,
610 Pacific Building,
Portland 4, Oregon,
Attorney for Appellant.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 7–55

SUBJECT INDEX

TABLE OF CASES

STATUTES

EXECUTIVE ORDERS

MISCELLANEOUS AUTHORITIES

No. 14661

United States
COURT OF APPEALS
for the Ninth Circuit

SAM D. RAWSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court for the District of Oregon

ARGUMENT

POINT A: The mining laws of the United States apply to "lands belonging to the United States", and that statutory language applies to the land here involved. (Reply to Appellee's Point A)

The dispute in this case is over a narrow question of law: was the court below in error in reading into the phrase found in 30 U.S.C. sec. 22 "lands belonging to the United States" the concept that the phrase does not

extend to land once patented and thereafter "reacquired" by the United States?

This is a case of the first impression and prior dictas in relation to other problems not particularly helpful. Appellee quotes a statement from Newhall v. Sanger, 92 U.S. 761, 763, 23 L. Ed. 769 (1875):

> "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." Appellee's Br. 4.

This statement leaves undecided the very question for decision: whether or not the land here involved is "subject to sale or other disposal under the general land laws", to-wit, under the mining laws of the United States. None of the cases which reaffirms the Newhall dictum are in the least helpful in deciding whether the particular land involved here was meant by Congress to be subject to mineral entry under the mining laws of the United States. None of them deal with the mining laws.

In United States v. Blendaur, 128 Fed. 910 (C.C.A. 9), this court cited practically every case cited by appellee in its brief at page 4, and said as to certain lands ceded by the Flathead Indians and "acquired" by the United States:

> "The contention of the appellee that they were not public lands, because these lands indicate only such lands belonging to the United States as are subject to sale or other disposition under general laws. (Wilcox v. Jackson, 13 Pet. 498, 513, 10 L. Ed. 264; Leavenworth, L. & G. R. Co. v. United States, 92 U.S. 733, 23 L. Ed. 634; Newhall v. Sang-

er, 92 U.S. 761, 23 L. Ed. 769; Bardon v. R. R. Co., 145 U.S. 535, 12 Sup. Ct. 856, 36 L. Ed. 806; Mann v. Tacoma Land Co., 153 U.S. 273,, 14 Sup. Ct. 820, 38 L. Ed. 714; Barker v. Harvey, 181 U.S. 481, 491, 21 Sup. Ct. 690, 45 L. Ed. 963), cannot be sustained. The words 'public lands' are not always used in the same sense. Their true meaning and effect are to be determined by the context in which they are used, and it is the duty of the court not to give such a meaning to the words as would destroy the object and purpose of the law or lead to absurd results. There are many cases where the courts have been called upon to decide the meaning of these words. In United States v. Bisel, 8 Mont. 20, 30, 19 Pac. 251, the court after referring to the decision in Wilcox v. Jackson, Newhall v. Sanger and other cases said:

" 'There is no statutory definition of the words "public lands", and the meaning of them may vary somewhat in different statutes passed for different purposes, and they should be given such meaning in each as comports with the intention of Congress in their use.' " (p. 913)

Here our starting point is that the mining laws "have been construed very liberally in favor of the miners." Davis, *Fifty Years of Mining Law,* 50 Har. L. Rev. 897, 900. Presumptively the land involved here is open to entry unless there has been some express provision to the contrary. Lockhart v. Johnson, 181 U.S. 516, 520, 21 Sup. Ct. Rep. 665, 45 L. Ed. 979.

Appellee attempts to shrug off the fact that the decisive words in the Act of May 10, 1872, which is now 30 U.S.C. sec. 22, "lands belonging to the United States" represent a change from the language used in the preceding mining law, Act of July 26, 1866, c. 262, sec. 1,

14 Stat. 251: "mineral lands of the public domain." Unless Congress was completely futile in making the change, the new language in the Act of May 10, 1872 either broadened or clarified the language of the preceding act. By the change Congress clearly adopted one definition of "public domain" i.e. territory belonging to the general government. State v. Cunningham, 35 Mont. 547, 90 P. 755.

If Representative's Sargeant's opinion that the Act of May 10, 1872 did not "make any important changes in the mining laws as they have heretofore existed" is correct, then the change by Congress must have clarified the meaning of the earlier act and the language "lands of the public domain" always meant "lands belonging to the United States." This is consistent with appellee's own case, Newhall v. Sanger, 92 U.S. 761, 763, 23 L. Ed. 769, where the term "public lands" was held to apply only to the land where "the complete title was absolutely vested in the United States."

"Acquired" land meets that test and the distinction the court below drew between "acquired" and "never-patented" public lands is untenable, particularly under the present wording of the statute. Whatever is the exact scope of the phrase "lands belonging to the United States", it is clear that it does not distinguish between "acquired" and "never-patented" public land.

The decision of the court below was based on this distinction:

> "Such 20 acre tract is not in the public domain but is acquired land not subject to mineral entry." Conclusion of Law IV, R. 22.

Consequently the court was in error when it adjudged appellant's mining claim null and void.

Oklahoma v. Texas, 258 U.S. 574, 66 L. Ed. 771, 42 Sup. Ct. 406, does not deal with acquired land and the statement appellee quotes is a dicta made with respect to the disposition of public land which had never been patented. Appellee's Br. 4. Here, unlike in the Oklahoma case there is not a series of special statutes showing Congress' intent that the mining laws are not to apply. See appellant's opening brief, pages 33 through 35 for a full statement.

Often the most significant things about an appellee's brief are the points made in appellant's brief which are not answered at all. Appellee does not answer authorities cited by appellant at pages 30 through 33 of his brief. First, no answer is made to appellant's contention that Congress itself has construed 30 U.S.C. sec. 22 to cover acquired lands. 34 Stat. 344, 43 U.S.C. sec 153. Appellant's Br. 30.

Second, there is no answer to appellant's argument that acquired lands were an old problem of which Congress was aware when the Act of May 10, 1872, c. 152, sec. 1, 17 Stat. 91, was passed. Appellant's Br. 30-31.

Finally, appellee fails to either cite or distinguish Verdier v. Railrod Company, 15 South Carolina 476. This is the controlling case here. The court there held that the railroad grant section of the earlier mining law, Act of July 26, 1866, 14 Stat. 251, extended to lands acquired by the United States by Civil War taxation in the States of the Confederacy. The court specifically re-

jected the argument that "public lands" as used in that statute did not apply to lands previously granted and owned as private property. See Appellant's Br. 31-33.

Appellee has not shown why Congress does not intend that the mining laws should apply to this metalliferous 20 acre tract which the parties have agreed "is not presently and never has been suitable for cultivation or for agricultural purposes and this is apparent because of the steep slope and because of the hard-pan lying just below the surface, said tract has at all times herein involved been and now is chiefly valuable as mineral land because of the cinder content of said Round Butte." Agreed Fact VI, R. 6. Appellee would construe the words "lands belonging to the United States" so that a different result would be reached on two identical 20 acre tracts both owned by the United States and lying side by side on some sage brush butte solely upon the basis of the accidental fact that one tract has been "reacquired" by the United States.

POINT B: Congress has never stated an intent that the mining laws of the United States should not apply to the land involved here. (Reply to Appellee's Point B)

It was an agreed fact that:

> "The President had authority under said Emergency Relief Appropriations Act of 1935 and under the act of August 24, 1935, (49 Stat. 115) to make the disposition of all of said lands including said Section 13 as was made by said Executive Order (No. 7672)". Agreed Fact XI R. 9. (Insertion added)

The Act of August 24, 1935, ch. 641, sec. 55, 49 Stat. 750, 781 provides in part:

> "There is hereby made available, out of any money appropriated by the Emergency Relief Appropriation Act of 1935, such amount as the President may allot for the development of a national program of land conservation and *land utilization.*" (Emphasis supplied)

After the land in question was acquired, the President issued Executive Order No. 7672 disposing of it. In view of the nature of this particular land he recognized that mining thereon was not inconsistent with the Central Oregon Land Project and so gave the direction that the "mineral resources" of lands were open to development "under the applicable laws." This was his program of "utilization" for this land.

Appellee has no explanation why the particular section of land here involved, Section 13, T. 11 S, R. 12 E. was listed in Executive Order No. 7672 if the order was not to apply to it. Appellant in his opening brief has analyzed Executive Order No. 7672 phrase by phrase and has demonstrated how each phrase is consistent with, indeed, requires the conclusion that the President

recognized the right of mineral entry as to the land here involved. Appellant's Br. 13-16. Appellee does not answer this detailed analysis but instead assumes its own construction without any explanation.

Section 1 of Executive Order No. 7672 does two things: first and most important, it lists all the land being transferred into the Central Oregon Land Project; and second, it provides that insofar as Executive Order No. 6910 temporarily withdrew from entry some of those enumerated and described lands it was revoked. The President throughout Executive Order No. 7672 and particularly in Section 2 used the words "public lands" in the sense of all government owned land listed in the order by their legal descriptions. Otherwise Section 13 of T. 11 S. R. 12 E. was never placed in the Central Oregon Land Project since it consists of nothing but "acquired land". P. 32. By section 2 of the order the withdrawal of Section 13 is made subject to the conditions stated in the Act of June 25, 1910, ch. 421, 36 Stat. 847, as amended by the Act of August 24, 1912, ch. 369, 37 Stat. 497, 43 U.S.C. sec. 141 and 142. That condition is that the land withdrawn shall at all times be open to discovery under the mining laws of the United States.

Appellant has pointed out that the choice by the President to act under his statutory withdrawal powers requires the land so withdrawn to remain open to mineral entry. Withdrawal Act, 43 U.S.C. sec. 141 and 142; Appellant's Br. 17-22. The appellee does not explain why the land is not subject to mineral entry under the provisions of that statute, in view of its express language.

The appellee is equally embarrassed by an opinion of its Attorney General, 40 Op. A.G. 73. See Appellant's Br. 20-22. After a lengthy consideration of the whole problem of withdrawals, the Attorney General there concluded that if the President withdraws land under his statutory powers, the right of mineral entry continues; while if the withdrawal order is issued under his non-statutory powers, the right of mineral entry does not continue. Here Executive Order No. 7672 expressly recites that the President was acting under his statutory powers. See text thereof set out in Appellant's Brief at pages 11-13.

The government officials concerned have not seen fit to follow this simple and understandable rule. There is nothing in the Attorney General's opinion to the effect that the land there involved was *unpatented* public domain. The opinion simply says "public domain", an ambiguous phrase which may refer to all land owned by the United States. A reading of the opinion indicates that the Attorney General is stating a comprehensive rule as to all withdrawals of government land by the President.

Appellee cites United States v. Holliday, 24 F. Supp. 112, and Jones v. United States, 195 F. 2d 707, 709 (C.C.A. 9). The Holliday case is discussed at page 33 of appellant's opening brief and is not in point here since it does not involve the effect of Executive Order No. 7672 nor the construction of the mining laws of the United States. The Jones case has no application since appellant here claims a metalliferous placer claim. See footnote in the Jones case page 709. (195 F. 2d 707, 709)

It was an agreed fact that the cinders involved here "consist principally of silicon, aluminum, potassium, sodium, iron, calcium and magnesium." Agreed Fact V, R. 5. No question exists that appellant "discovered the mineral deposit of cinders on said 20 acres." And that the "deposit of cinders has a commercial value." Agreed Facts V and VII, R. 5-6.

The President when he issued Executive Order No. 7672 decided that there was no inconsistency between the purposes of the Central Oregon Land Project and development of the minerals under the applicable laws. It has previously been pointed out that Congress has not indicated that the mining laws are not to apply to "acquired" lands. On the contrary Congress itself has regarded those laws as applicable to "acquired" land. 43 U.S.C. sec 153. Any other construction would lead to absurdity in treating identical land lying side by side differently. The President recognized this in his order, and clearly regards this so-called "acquired" land as "public land" and provides that its withdrawal should be subject to the conditions stated in the Withdrawal Act, 43 U.S.C. sec 141 and 142, namely that all lands withdrawn under that act should be open to discovery under the mining laws of the United States. Executive Order No. 7672, sec. 2.

POINT C: The mineral deposits in the land here involved were not disposed of prior to appellant's location thereof, and every administrative action with respect to the land here involved has been expressly subject to Executive Order No. 7672 and the mining laws of the United States. (Reply to Appellee's Point C)

Executive Order No. 7672 refers to the land here involved by specific legal description: Section 13, T. 11 S. R. 12 E. Willamette Meridian. Appellee does not even suggest that this order has ever been revoked.

Appellee claims that the land here involved was transferred to the Secretary of Agriculture for administration under the Bankhead-Jones Farm Tenant Act, 7 U.S.C. sec. 1000 *et seq.*, by Executive Order No. 7908. There is no evidence in the record showing that the particular land here involved was transferred by that order. Appellee concedes this and instead relies upon a series of general executive orders to connect Executive Order No. 7908 with this land. Appellee's Br. 10.

Assuming *arguendo* only that the land was transferred by Executive Order No. 7908 the text of the order specifically excludes from its operation the rights of mineral entry. Said order was retroactively amended by Executive Order No. 8531. Hence the text as set out in appendix to appellee's brief is obsolete. (See appendix to this brief.)

The order as amended states in part:

> "*And provided Further* * * * that this order, or any order which may hereafter set apart and reserve land from the public domain for use, the administration, for disposition in accordance with the provisions of Title III of said Bankhead-Jones Farm

> Tenant Act and the relative provisions of Title IV thereof, shall not apply to the right, title and interest of the United States in the mineral resources of the land which have been, or may hereafter be set apart and reserved from the public domain, and shall not restrict the disposition of such mineral resources under the public land laws."

In this confusion of orders one fact is clear: Executive Order No. 7672 is not revoked by Executive Order 7908 nor by any other Executive Order and remains in full force and effect.

Assuming *arguendo* only that the land here involved was transferred to the Secretary of Agriculture pursuant to the Bankhead-Jones Farm Tenant Act, 50 Stat. 522, 526, 7 U.S.C. sec. 1011(a) then the Secretary acquired it "subject to any reservations, outstanding estates, interests, easements, or other encumbrances which the Secretary determines will not interfere with the utilization of such property for the purposes of sections 1001-1005d, 1007, and 1008-1029 of the title." It follows then that the Secretary acquired it subject to the prior provisions of Executive Order No. 7672, which has never been modified or revoked.

The language in 7 U.S.C. sec. 1011(c) which appellee quotes to disposal to public authorities is inapplicable here for two reasons: (1) it only applies to a disposition by the Secretary of Agriculture and not by other officials; and (2) entry under the mining laws pursuant to the proviso in Executive Order No. 7672 is not a disposal at all in the sense of Section 1011(c) since the mineral entry rights were never transferred to the Secretary at all. Appellee's Br. 10. In short, if the Secretary took, he took

subject to the proviso in Executive Order No. 7672 continuing the rights of mineral entry.

This was, in fact, the way the Secretary of Agriculture construed the situation when he entered into the 1940 License Agreement: he excepted from the agreement the rights of mineral entry as protected and continued by Executive Order No. 7672. Ex. 6, pp. 4-5. It is interesting to note that Executive Order No. 7908 was dated June 10, 1938. The license agreement which defers to Executive Order No. 7672 is dated April 19, 1940, and makes no reference to Executive Order No. 7908.

Since even the Secretary of Agriculture regarded himself as bound by Executive Order No. 7672, it is not apparent how any shuffling of the administration of the land here involved between various government bureaus can affect the substantive rights of the appellant under the terms of Executive Order No. 7672 and the mining laws of the United States. The Secretary as a subordinate of the President is in no position to reverse the determination of the President in Executive Order No. 7672 that the lands in the Central Oregon Land Project were to be open to mineral entry and that such entry does not interfere with the primary purpose for which that land was acquired. Nor can the subordinate Secretary impose conditions different than those the President himself has imposed.

LICENSE AGREEMENT

This case arose only after appellant brought a suit in equity in the state courts to enjoin the operations of one F. C. Somers who was removing cinders from appellant's

claim. R. 8. *There is no basis in the record, and none is cited by appellee; and it is in fact untrue that F. C. Somers was extracting cinders from the land prior to appellant's location thereof.* Appellee's Br. 12.

Somers was a contractor with the State of Oregon and did remove cinders from the land but *after* appellant's location thereof. The land in question here was subject to a licensing agreement with the State of Oregon made in 1940. The 20 acres involved here was only a small part of the land covered by the agreement. Ex. 6 (See Exhibit A thereto).

This licensing agreement reserved to the United States:

> "All rights to the oil, gas, coal and other mineral ores whatsoever upon, in, or under said property, together with the usual mining rights, powers and privileges, including the right of access to and use of such parts of the surface of the premises as may be necessary for mining and saving said minerals." Ex. 6, p. 3.

The agreement, however, granted a narrowly restricted right to the State of Oregon "to use stone, gravel, and similar substances from said property, provided such materials are used for construction purposes or in connection with said property." Ex. 6, p. 4. Appellant denies that F. C. Somers was extracting cinders "for construction purposes *upon* or *in connection with said property*"; and the appellee offered no evidence to that effect. (Emphasis supplied)

However, it is unnecessary here to decide whether F. C. Somers was exercising any rights of the licensee State

of Oregon since the licensing agreement expressly subjects any rights of the State of Oregon to the right of mineral etnry by persons such as appellant:

> "It is provided, however, insofar as the land subject to this agreement consists of public domain reserved for use in connection with the project by Executive Order No. 7672, dated July 19, 1937, that nothing in this agreement shall be construed to restrict the disposition of mineral resources contained in such lands under the public land laws of the United States." Ex. 6, p. 4.

The license agreement thus recognizes, as it had to, that the agreement by the Secretary of Agriculture could not alter the provision which the President had made in Executive Order No. 7672 allowing the right of mineral entry in the land listed in the order.

Since here both the licensing agreement and the Executive Order No. 7672 expressly continue the right of mineral entry, the case of United States v. Schaub, 103 F. Supp. 873, *aff'd per curiam,* 207 F. 2d 325 (C.C.A. 9) is not in point. In that case the withdrawal order had no such explicit saving proviso and was issued under 48 U.S.C. sec. 341. That section expressly provides that the right of mineral entry should not continue. Here the withdrawal order was issued under the Withdrawal Act, 43 U.S.C. sec. 142 which expressly states that the right of mineral entry should continue. Here the State's rights and those of any contractor with it were subject to the provisions of Executive Order No. 7672 which is in effect incorporated by reference in the licensing agreement.

CONCLUSION

Appellant validly located a mining claim upon the land in question since it was open to entry under the express terms of Executive Order No. 7672, the Withdrawal Act, 42 U.S.C. sec 142, and the mining laws of the United States. The court below was, therefore, in error and its judgment should be reversed.

Respectfully submitted,

NORMAN N. GRIFFITH
Attorney for Appellant.

APPENDIX

EXECUTIVE ORDER

AMENDING EXECUTIVE ORDER NO. 7908 of JUNE 9, 1938, TRANSFERRING CERTAIN LANDS TO THE SECRETARY OF AGRICULTURE FOR USE, ADMINISTRATION, AND DISPOSITION UNDER TITLE III OF THE BANKHEAD-JONES FARM TENANT ACT.

By virtue of the authority vested in me by section 45 of the Bankhead-Jones Farm Tenant Act, approved July 22, 1937 (50 Stat. 522), I hereby amend the two provisos contained in Executive Order No. 7908[1] of June 9, 1938, transferring certain lands to the Secretary of Agriculture for use, administration and disposition under Title III of the Bankhead-Jones Farm Tenant Act, to read as follows:

> "*Provided,* that no lands heretofore or hereafter set apart and reserved from the public domain for use, administration, and disposition in accordance with the provisions of Title III of the said Bankhead-Jones Farm Tenant Act and the related provisions of Title IV thereof, shall be disposed of by sale, exchange, or grant, in accordance with the provisions of said act, without the approval of the Secretary of the Interior, and no transfer of title to such lands shall be complete unless evidenced by patent issued by the General Land Office;
>
> "*And provided further,* that this order shall not apply to any of said lands which have been, by Executive order or proclamation, included in or reserved as a part of a national forest or of a wildlife,

[1] 3 F.R. 1389.

waterfowl, migratory bird, or research refuge, and that after this order, or any order which may hereafter set apart and reserve land from the public domain for use, administration, and disposition in accordance with the provisions of Title III of said Bankhead-Jones Farm Tenant Act and the related provisions of Title IV thereof, shall not apply to the right, title, and interest of the United States in the mineral resources of the lands which have been, or may hereafter be, set apart and reserved from the public domain, and shall not restrict the disposition of such mineral resources under the public land laws."

FRANKLIN D. ROOSEVELT

The White House

Aug. 31st, 1940

(No. 8531)

(F.R. Doc. 40-3685; Filed September 3, 1940; 3:50 p.m.)